

1 Fifty-five is Terry Davis' summary of the amounts
2 billed to the Complainants but not paid. It's
3 essentially the difference between what we have
4 invoiced, which is what we contend is the fair market
5 value for the attachments and the amounts that they
6 have paid.

7 JUDGE SIPPEL: And this is a summary of
8 those billings?

9 MR. LANGLEY: Yes, it is. It is part of
10 Terry Davis' testimony.

11 JUDGE SIPPEL: Any objection to that?

12 MR. SEIVER: It's news to us, Your Honor.
13 I had never seen any analysis like this. She
14 obviously must have prepared it for her deposition
15 testimony, and I think it's incomplete, but obviously
16 I could point it out that, you know, the amounts that
17 they billed were based on this fair market value, and
18 so to show a current balance of \$35 million is
19 misleading, especially sine -- and there's no time
20 frame on this particular set of payments. You know,
21 the Commission had already ordered that those rates
22 that they had been billing at were struck down, and

1 that the amounts we paid were what's in order.

2 So I think it's a misleading document,
3 Your Honor.

4 MR. LANGLEY: I'm sure Mr. Seiver will
5 cross examine Terry Davis at length about that.

6 JUDGE SIPPEL: Well, I mean, it doesn't
7 even have any dates in here. Summary of Complainant
8 billings, it doesn't even have a period of time.

9 MR. LANGLEY: The dates are actually in
10 Terry Davis' direct written testimony, and she makes
11 reference to this exhibit.

12 JUDGE SIPPEL: Well, we could go back and
13 forth on this, but personally, I think it's de
14 minimis. I'm looking for what it is in the context of
15 her testimony or her affidavit, not in some abstract
16 basis as it's inserted here, but in some one page, and
17 we are going to get to it anyway. So I think it is
18 just as much to do about nothing to spend much time on
19 it.

20 I hear Mr. Seiver's. I'll take it in the
21 form of an objection. It's a good objection, but for
22 practical reasons, I'm going to overrule it. That's

1 with respect to 55.

2 Fifty-four, again, the proffer of
3 relevance, I'm accepting that.

4 Let me make my ruling and then I want to
5 come back to something about 54. The Gulf Power
6 tabbed documents 54 and 55 are now identified for
7 receipt in evidence as Gulf Power Exhibits 54 and 55,
8 and they are hereby received into evidence as Gulf
9 Power's Exhibits 54 and 55.

10 (Whereupon, the documents
11 referred to were marked as Gulf
12 Power Exhibit Nos. 54 and 55 for
13 identification and were received
14 in evidence.)

15 JUDGE SIPPEL: And I just had to make a
16 quick comment on the concept of a roll forward ledger.
17 I have some ideas as to what a roll forward ledger is,
18 but I really don't know what your business use of that
19 terminology is, and what I'd like to ask you to do is
20 to go through these exhibits and any other place that
21 you're going to have evidence, and if there is a term
22 of art that's peculiar for business usage or whatnot,

1 if you wouldn't mind just preparing a glossary of it
2 for me and certainly show it to Mr. Seiver before you
3 give it to me.

4 Well, that speaks for itself.

5 Okay. What would be the next grouping
6 then, Mr. Langley?

7 MR. LANGLEY: Fifty-six through 65.

8 JUDGE SIPPEL: Fifty-six through 60 --
9 where are you going?

10 MR. LANGLEY: Through 65. I'll tell you
11 what. Why don't we take it in smaller chunks and deal
12 with the remainder of Notebook 4 of 5. Is that
13 acceptable?

14 JUDGE SIPPEL: That's what I was just
15 going to ask you to do. Fifty-six through 62.

16 Now, Mr. Seiver, as that is how we're
17 doing this, are there any of those documents, 56
18 through 62, that either you or Mr. Cook has -- that
19 you want to comment on or have objection to?

20 MR. SEIVER: Yes, Your Honor. To get it
21 out of the way though, 56 we have no problem with.
22 That's the CV of Mr. Spain. I believe that was marked

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 at his deposition, and so we have no problem.

2 JUDGE SIPPEL: The CV being curriculum
3 vitae?

4 MR. SEIVER: Yes. Yes, Your Honor. I'm
5 sorry.

6 JUDGE SIPPEL: That's his pedigree. Okay.

7 MR. SEIVER: Fifty-seven, 58 and 59 are
8 the three CHELCO agreements that were the subject of
9 the separate motion to compel that Gulf filed which we
10 objected to and Your Honor ordered us to produce them,
11 and my understanding from your order was that there
12 was a limited reason for the production which would
13 not include them being part of the evidentiary
14 submission of Gulf Power's case, but only for cross-
15 examining our witness on construction standards.

16 JUDGE SIPPEL: Mr. Campbell?

17 MR. CAMPBELL: Yes, Your Honor. I will
18 respond to that.

19 I was not involved with the motion to
20 compel, and I don't believe Mr. Spain, who is an
21 expert that we have proffered testimony from -- his
22 testimony was not developed at that point in time. He

1 relies on these CHELCO agreements to be additional
2 evidence of the unregulated market that exists out
3 there for pole attachment rates.

4 We have ILEC agreements in there. There
5 are municipal utilities who have attachments on their
6 poles. There are cooperatives out there. All of that
7 underpins Mr. Spain's testimony and is highly relevant
8 to that testimony.

9 I don't think that was fully fleshed out
10 at the time you made your ruling on the motion to
11 compel, and of course, as we've pointed out with
12 respect to Ms. Davis' documents, the documents have to
13 be considered in the context of the testimony that is
14 referring to the documents, and I think Mr. Spain's
15 testimony brings that into focus, that additional
16 relevance item.

17 And then Mr. Seiver has pointed out that
18 the construction specification issue was made relevant
19 by their expert witness who talks about, quote,
20 unquote, industry standard, and so we will cross
21 examine him on those issues.

22 But these exhibits are relied upon by our

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 expert as underpinning several components of his
2 testimony.

3 MR. LANGLEY: I might need to formally
4 move to strike that part of Mr. Spain's testimony that
5 relies on them because in Your Honor's order it said
6 use of CHELCO agreements will be permitted but only
7 for cross examination, thereby eliminating
8 Complainants' concerns of burden.

9 MR. CAMPBELL: Again, Your Honor, I don't
10 think you were considering Mr. Spain's testimony at
11 that time. It was a motion to compel discovery
12 ruling. The testimony had not been fleshed out.
13 These documents are very similar to the ILEC
14 agreements that have already been admitted into
15 evidence without objection from the other side.

16 So I don't know what the burdensome nature
17 of them is. It just is another part of that
18 unregulated market.

19 JUDGE SIPPEL: Well, he's right. My
20 ruling, I was looking for a handle on relevancy, and
21 since we're talking about compensation in a regulated
22 market and those agreements have to do with an

1 unregulated market, you know, in a lot of contexts
2 that really makes them apples and oranges.

3 However, --

4 MR. CAMPBELL: Actually it brings them
5 more into the world of apples and apples under the
6 lost opportunity prong and what we have lost out there
7 because the rate and the sufficiency of the rate has
8 always been an issue in this case, and what they're
9 saying is that this is adequate compensation, that
10 there's no market out there that you can demonstrate
11 that you are being deprived of participating in and
12 extracting higher fair market rates.

13 And we say, "Wait a minute. You're wrong
14 about that. There is a market out there. It's a
15 market that is not regulated," and here they are,
16 agreements Complainants have entered into.

17 JUDGE SIPPEL: That's precisely the reason
18 that I ruled the way I did. Your side would have the
19 opportunity to cross examine his experts with that
20 document to show just the point that you're making.
21 I never anticipated seeing it become a part of your
22 case-in-chief.

1 MR. CAMPBELL: We understand, Your Honor,
2 that on the issue of this hearing order and what was
3 set, that we have the burden of proof. We have to
4 make it part of our case-in-chief. Otherwise that
5 item doesn't come in in our case-in-chief, in our
6 prima facie case.

7 We want to show as part of our prima facie
8 case that there's an unregulated market, that there
9 are opportunities out there that there are fair market
10 value transactions. There are arm's length
11 transactions, and the Complainants themselves enter
12 into these arm's length transactions at rates that are
13 multiples of the rates they're paying us under the
14 federal scheme.

15 So, you know, we have an expert. He has
16 testified about them. They could cross examine our
17 expert, and so the shoe fits just as easily for them,
18 I think.

19 JUDGE SIPPEL: Well, I'm assuming Mr.
20 Spain has been deposed.

21 MR. LANGLEY: Yes, he was. Mr. Cook took
22 his deposition.

1 MR. CAMPBELL: Yes.

2 JUDGE SIPPEL: Well, was this subject part
3 of his deposition.

4 MR. COOK: No, it was not because we
5 didn't have the documents. They just produced them
6 after Mr. Spain's deposition

7 MR. LANGLEY: But, Your Honor, Mr.
8 Campbell's request to have all of this kind of stuff
9 in about the unregulated market, I think you wisely
10 asked what unregulated market there.

11 But the important thing is we have to come
12 back for a touchstone of relevance to the APCo
13 standard, showing that they cannot accommodate a new
14 attacher because the full capacity and a lost cause by
15 the Complainants. The words used by APCo for closed
16 a sale, out more money, they have to show proof of
17 loss. That's the constitutional touchstone of this
18 case, loss to the owner, the basis of their taking
19 this claim for just compensation.

20 So how have our clients, the Complainants'
21 attachments, caused specific loss on the specific
22 poles? And the universe for this hearing is their 50

1 and our 50. What possible relevance could the -- what
2 our clients pay somebody else who might not be in this
3 case a municipal entity not regulated by Section 224,
4 how does that relate to a loss that we have caused
5 them on their poles?

6 The answer is none, and to the extent they
7 say, "Well, Your Honor, but we've lost an opportunity
8 to charge what we believe is fair," hey, what they
9 like to call a fair market value in the market. The
10 APCo court, if you will draw your attention to
11 311.1369, approximately, where it says, you know, the
12 utility industry is saying that they have a lost
13 opportunity merely by not being able to charge what
14 they would like to charge, and it rejects that
15 explicitly. Right there that is a critical section
16 where they say, you know, you can't just say that even
17 though you're not out any more money, that you have a
18 loss for purposes of the Constitution that will
19 satisfy the standard; just because you can't charge
20 what you think you'd like to charge and what other
21 people who aren't covered by the statute might be able
22 to be billed doesn't mean that they have a loss caused

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 by us on specific poles.

2 And that's the lack of relevance here and
3 in a number of other exhibits that we're about to deal
4 with as well.

5 JUDGE SIPPEL: Okay. Well, I'm not going
6 to have to hear any more on this. I'll tell you what.
7 You know what the purpose of today is. This is going
8 to come in one way or the other. There's no question
9 about it. I mean either cross examination or their
10 case-in-chief.

11 Your argument is going to be the same no
12 matter how it comes in, and I'm going to have to
13 address it no matter how it comes in, and I think that
14 the Commission would want to see this subject matter
15 to handle.

16 I think if we just extracted that from the
17 case as being irrelevant under the Alabama decision,
18 I think it's courting serious problems down the road
19 in terms of remand.

20 So I'm going to have to look at this in
21 some way, shape or form. So, you know, if it's that
22 clear, if you could delineate it that surgically in

1 findings, you're going to have to advance a very
2 strong case.

3 My initial reaction to it was just as I
4 ruled. It was a discovery -- Mr. Campbell is right --
5 it was a discovery ruling, and I found a handle by
6 which they should get it in discovery. That's all I
7 did.

8 Mr. Seiver read my language. I definitely
9 was stronger than just that, but if it's a
10 reconsideration, I'll reconsider it. This is just,
11 again, a discretionary evidentiary ruling, and with a
12 lot of caveats I'm going to allow it to come in, "it"
13 being the 58 through 59 documents, the CHELCO
14 agreements.

15 MR. LANGLEY: Your Honor, may I presume
16 that the Court understands that we strenuously
17 disagree with your interpretation?

18 JUDGE SIPPEL: I do, I do. But there's no
19 point in going into it. I don't see any point in
20 going into it now.

21 If you want to make some kind of a proffer
22 of the relevance, by all means, do because I haven't

1 really gotten that from you yet.

2 MR. LANGLEY: I think Mr. Campbell made
3 our proffer of relevance. I will note for the record
4 that there is an intense disagreement between the
5 sides about what the Alabama Power v. FCC case means,
6 but that's something that Your Honor will be deciding
7 in the context of the evidence.

8 JUDGE SIPPEL: The Eleventh Circuit wasn't
9 all that clear? Is that what I'm hearing?

10 MR. SEIVER: Not from our standpoint, not
11 from us.

12 JUDGE SIPPEL: Okay. I'll say no more.
13 All right. Well, if you can parse through what my
14 ruling was, I'm going to overrule the objection or
15 consider the objection. I'm going to consider my
16 ruling on the objection actually in suspense perhaps
17 as far down as the proposed findings, but I am going
18 to in my discretion as an evidentiary matter at this
19 point receive into evidence the exhibits, the Tab 58
20 to 59 documents.

21 And in fact, now I'm going to rule on 56
22 through 59; is that correct, Mr. Campbell?

1 MR. CAMPBELL: Yes, Your Honor. We move
2 to admit 56 through 59.

3 JUDGE SIPPEL: All right. Then the
4 documents which have been tabbed in Gulf Power's
5 Notebook 4 of 5 as documents 56 through 59 are deemed
6 marked for identification as Gulf Power's 56 through
7 59 and are received in evidence as Gulf Power's
8 Exhibits 56 through 59.

9 (Whereupon, the documents
10 referred to were marked as Gulf
11 Power Exhibit Nos. 56 through 59
12 for identification and were
13 received in evidence.)

14 JUDGE SIPPEL: Now, that leaves 60 to 62
15 in this volume. Mr. Seiver, do you have any concerns
16 about those documents other than what you've
17 articulated?

18 MR. SEIVER: Well, Your Honor, 60 again is
19 a new compilation document that we've never seen
20 before. I presume it must have been prepared for one
21 of the witnesses who was deposed, but is testifying.
22 I don't know what it's based on where the numbers were

1 taken from. Again, it's more of a demonstrative
2 exhibit, I guess, to support some conclusion as to
3 what amount was paid compared to what amount they
4 would have billed.

5 And with all of our other objections, if
6 someone is going to use that, we can deal with it at
7 the time, but I wanted to make sure that I objected to
8 it beyond the usual.

9 MR. COOK: And I can add an extra
10 clarification. Your Honor, it may be that 60 -- it's
11 a list that includes what other people other than the
12 four cable operators here are paid. So we would have
13 certainly the same relevance objection to that.

14 When I took Mr. Spain's deposition, I
15 asked him, you know, what research have you done, and
16 one of his answers was, "I've looked at a sheet that
17 includes information about what people other than the
18 four cable operator complainants in this case are
19 paying."

20 It may very well be that Mr. Campbell and
21 Mr. Langley will tell you that this is the sheet or
22 has some of that data from it, but that portion,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 again, we're first seeing last Friday.

2 JUDGE SIPPEL: Mr. Campbell.

3 MR. CAMPBELL: I'll say a couple of things
4 about Exhibit 60, first and foremost, that it is the
5 sheet that Mr. Spain referred to in his deposition,
6 and as we identified on our exhibit list itself, it is
7 a summary of voluminous evidence.

8 There is a specific Federal Rule of
9 Evidence that deals with summaries. They are not
10 demonstrative. They are entitled to be admitted into
11 evidence. The necessary foundations are established
12 in prefiled written direct testimony that we submitted
13 and will be further established on the stand when
14 these witnesses appear for live cross examination.

15 Specifically, it relates to Exhibit 65 and
16 a summary of some of the voluminous data that is
17 captured there. Exhibit 65 is a collection of
18 documents that were produced in response to a
19 discovery request propounded by the Complainants onto
20 us that asked us for the evidence that we had that
21 there is an unregulated market for pole space.

22 We responded. It's relied upon by our

1 expert, and it's captured in Exhibit 60 and 65, and we
2 move that both be admitted into evidence.

3 JUDGE SIPPEL: All right. Let's not get
4 to 65. We're trying to just focus on 62.

5 MR. CAMPBELL: Okay.

6 JUDGE SIPPEL: But as a proffer of
7 relevance that's fine.

8 Where do we stand on this now?

9 MR. SEIVER: Well, Your Honor, as far as
10 Exhibit 60 is concerned, anything that's misleading
11 about it, for example, that might suggest that all 19
12 are on one pole or any group of these people are on
13 the same poles, we've had an argument that the four
14 Complainants here show that the poles are crowded.
15 Yet the evidence has shown that they're not all on the
16 same poles. In different areas there are occasional
17 overlaps where two cable operators that we represent
18 may be on one pole and then an over builder like
19 Knology.

20 But that can all be cleared up at hearing,
21 and I still believe that if it's a compilation
22 exhibit, then it's not independently admissible. If

1 we're going to get to Exhibit 65 and that's what's
2 admissible, then I believe we can deal with Exhibit
3 60.

4 JUDGE SIPPEL: Well, if it's not handled
5 adequately by a compilation document, you say you're
6 intending to have your experts are going to use this?

7 MR. CAMPBELL: The expert relied on the
8 document, looked at the document, but we have a fact
9 witness from Gulf Power who will testify about the
10 document, and it is a summary.

11 JUDGE SIPPEL: All right.

12 MR. CAMPBELL: And there is a Federal Rule
13 of Evidence there that deals with it. I can't
14 remember the rule.

15 JUDGE SIPPEL: And that's going to be in
16 your case-in-chief?

17 MR. CAMPBELL: Correct. One thousand and
18 six is the Federal Rule of Evidence. It will be in
19 our case-in-chief, yes, Your Honor.

20 JUDGE SIPPEL: All right. Well, that's
21 part of your affirmative case. That's part of your
22 burden with those witnesses. I mean, subject to it

1 being further shown to be reliable and a worthy
2 document, since it being a compilation, subject to
3 further, in other words, testimonial verification and
4 noting the objection of Mr. Seiver and Mr. Cook, I'm
5 going to receive it into evidence conditionally as
6 your Number 60, Gulf Power 60.

7 What about 61 and 62?

8 MR. SEIVER: Well, Your Honor, 61 is a
9 much bigger problem, and it is not something that we
10 had seen before, but it's in the nature of a utility
11 association brief. I'd say it's almost like an amicus
12 brief.

13 JUDGE SIPPEL: Whoa, before we get to
14 that, let's say what is it entitled. It's entitled
15 what?

16 MR. SEIVER: APPA Pole Attachment
17 Workbook.

18 MR. COOK: And, Your Honor, that stands
19 for American Public Power Association.

20 JUDGE SIPPEL: All right, and it says that
21 it was prepared for. There were individuals.
22 Obviously they are authors, and it's prepared for the

1 American Public Power Association in December of 2002,
2 right?

3 MR. SEIVER: Yes, Your Honor.

4 JUDGE SIPPEL: All right. Now, let's hear
5 from Mr. Campbell. What's the proffer? What's the
6 relevance of this?

7 MR. CAMPBELL: I will start with what it
8 is, first. It's a document that was relied upon by
9 the expert that we have that is testifying in the
10 case, Mr. Roger Spain.

11 This is comparable, by the way, to many
12 documents that Complainants have on their exhibit list
13 that their experts relied on. They rely on the NESC,
14 which is a book. They rely on a workbook, which is a
15 book like this. They rely on a study concerning the
16 Madrid Airport in one of their experts' books.

17 These are the types of things that experts
18 rely on. They look at what data is out there, and
19 they use it to form their opinions in the case.

20 In this particular instance Mr. Spain has
21 looked at this document and said, "Hey, this industry
22 that is out there, the pole attachment industry, has

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 participants other than investor owned utilities.
2 There are municipal utilities. There are cooperative
3 utiltiies. I'm going to look at their practices, and
4 I'm going to see what their practices are, what their
5 construction specifications are would be an example;
6 what their rates are would be an example. How do they
7 deal with this joint use problem that we're here
8 arguing about today?"

9 This is the document he relied on to do
10 that.

11 JUDGE SIPPEL: Is that a trade association
12 document?

13 MR. CAMPBELL: It is.

14 JUDGE SIPPEL: Would that be a fair
15 characterization?

16 MR. CAMPBELL: That is a very fair
17 characterization, and what it does is it captures a
18 lot of the things that we're arguing about in this
19 proceeding, including make ready techniques, including
20 the rates that should be charged.

21 A lot of the issues that we address and
22 deal with here, this provides us a comparison how

1 people outside of this regulated industry deal with
2 these same problems and our expert relies on it.

3 JUDGE SIPPEL: Okay. It's a trade
4 association document. I mean, they're admitted pretty
5 readily it seems like.

6 MR. SEIVER: Well, for authentication
7 purposes, but the relevance and the prejudice of
8 having, you know, some public power association we've
9 not examined the people at to argue about the FCC's
10 formula and why and the where-how for going by that, I
11 do admit that we list it on our exhibit list, exactly
12 what our witnesses relied on. My understanding is
13 that Mr. Spain never identified this before his
14 deposition or during his deposition as something he
15 relied on. This is somewhat news to us.

16 But I didn't expect that every text that
17 they may have relied on would be admitted into
18 evidence. It might be identified or marked or
19 examined about, but just because they say, "I rely on
20 this 77 page document" -- I'm sorry. Seventy-seven.
21 It's well over a 100 page document.

22 Then that means I've got to go through

1 every page and say, "Did you rely on this page? Did
2 you rely on this page? Why did you do that?"

3 I don't think it's admissible for any
4 other reason, for any reason at all, let alone as a
5 document that was relied, on without specification.
6 I don't know how we can possibly get through a hearing
7 in a month, let alone a week, if we have to take
8 documents that he has relied on and pull out every
9 single sentence to ask if that formed part of his
10 opinion.

11 MR. CAMPBELL: I think we can deal with
12 this in a more limited fashion. I think the manner of
13 the questioning would be simple. If you put this
14 voluminous document in front of the experts and asked
15 him which part he relied on so that we don't have to
16 go through each page.

17 But you know, just to get a flavor for the
18 relevance of this document, you need only turn to the
19 table of contents and look at, for example, page 6 of
20 this document, which deals with some of the broad
21 categories it has in it: the nature of a pole
22 attachment agreement, uniform treatment of all

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 attachments, reservation of capacity, principles of
2 access, and then Chapter 4, pole attachment fees and
3 rate methodology, the exact issue we're dealing with
4 here in this proceeding.

5 And this is a document that is typically
6 relied upon by experts. Mr. Spain did not identify it
7 in his deposition because he didn't get it until after
8 his deposition. He continued this research. They can
9 cross examine him on that. They can cross examine him
10 about the document. They can raise relevance
11 objections in the flow of the testimony as it unfolds
12 at the hearing.

13 But certainly for purposes of our
14 proceeding here today, this document should be
15 admitted.

16 MR. COOK: Your Honor, I'd like to just
17 respond briefly. This is really gaming the system,
18 but specifically, I'd like to draw your attention to
19 page 29 and raise a bias objection to this specific
20 document.

21 It's one thing for a document that an
22 expert has relied upon to say, "Okay. This is